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Fifth Amendment--Double Jeopardy: Two-Tier Trial Systems and the Continuing Jeopardy Principle

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FIFTH AMENDMENT—DOUBLE JEOPARDY: TWO-TIER TRIAL SYSTEMS AND THE CONTINUING JEOPARDY PRINCIPLE

Justices of Boston Municipal Court v. Lydon, 104 S. Ct. 1805 (1984).

I. INTRODUCTION

Many states have adopted criminal trial systems that allow defendants to choose a bench trial initially and to demand a jury trial if dissatisfied with the bench trial results. In *Justices of Boston Municipal Court v. Lydon*,[1] the Supreme Court held that a defendant's retrial de novo after a first-tier bench trial conviction does not violate the double jeopardy clause of the fifth amendment.[2] The Supreme Court concluded that its earlier decision in *Burks v. United States*[3] did not apply to the two-tier system.[4] *Burks* held that the double jeopardy clause bars a second trial once a reviewing court reverses a conviction on the ground that the evidence presented at the first trial was legally insufficient.[5] The Court's decision in *Lydon* was based upon strong policies favoring both the defendant and the state, as well as upon significant distinctions between the Massachusetts two-tier system and the situation struck down in *Burks*.

This Note argues that the Court correctly decided *Lydon* because of the significant benefits provided to both the defendant and the state in the two-tier trial system. The Court wrongly based its decision, however, on its theory of continuing jeopardy. The Court's interpretation of continuing jeopardy may create confusion and lead to future double jeopardy violations. The Court should

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1 104 S. Ct. 1805 (1984).

2 The fifth amendment provides in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V. The double jeopardy clause was made applicable to the states through the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1969).

3 437 U.S. 1 (1978).

4 *Lydon*, 104 S. Ct. at 1814. On the same day that *Burks* was decided, the Court made *Burks* applicable to the states through the fourteenth amendment. Greene v. Massey, 437 U.S. 19, 24 (1978).

5 *Burks*, 437 U.S. at 18.

have adopted Justice Brennan's theory of continuing jeopardy, which would have minimized the possibility of future violations and provided lower courts with a workable theory of continuing jeopardy.

II. HISTORICAL BACKGROUND

The double jeopardy clause of the fifth amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ."[6] The Supreme Court has recognized three separate guarantees embodied in this constitutional right: "It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense."[7] The Court in *Lydon* evaluated the effectiveness of these guarantees under the two-tier trial system in Massachusetts.

Under the Massachusetts two-tier system, defendants charged with certain minor crimes in district and municipal courts may choose either a bench trial or a jury trial.[8] If defendants elect a jury trial and are convicted, they may seek appellate review. If they elect a bench trial and are dissatisfied with the results, they have an absolute right to a jury trial de novo[9] without the need to claim judicial

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6 U.S. CONST. amend. V.

7 *Lydon*, 104 S. Ct. 1805, 1813 (citing Illinois v. Vitale, 447 U.S. 410, 415 (1980)). The Court noted that it is especially important not to let the State unnecessarily reprosecute a defendant. *Lydon*, 104 S. Ct. at 1813. In Green v. United States, 355 U.S. 184 (1957), the Court explained that:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-88.

8 District and municipal courts in which the two-tier system operates shall exercise jurisdiction over:

> all violations of bylaws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years . . . [including] . . . breaking and entering a building, ship or vessel; making, possessing or using burglarious instruments and the crimes of escape and attempts to escape from any penal institution, forgery of a promissory note, or of any order for money or other property, and of uttering as true a forged note or order, knowing them to be forged.

MASS. GEN. LAWS ANN. ch. 218, § 26 (West Supp. 1981). The Massachusetts legislature amended this section several times after Lydon originally was tried and convicted. The revised section now lists fewer specific crimes and instead refers more generally to sections in the criminal code.

9 *Lydon*, 104 S. Ct. at 1807-08. The Massachusetts statute provides that:

> Trial of criminal offenses in the Boston municipal court department . . . shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by

error at the bench trial.[10] The jury trial is the defendant's only avenue of appeal from the bench trial; a defendant may not obtain appellate review of the bench trial.[11]

A. PRIOR SUPREME COURT DECISIONS ON TWO-TIER SYSTEMS

On two recent occasions, the Supreme Court has upheld the use of two-tier trial systems. The Supreme Court first considered the constitutionality of a state two-tier trial system[12] in *Colten v. Kentucky*.[13] Colten alleged that the Kentucky two-tier trial system violated the double jeopardy clause of the United States Constitution.[14]

The Court found that the Kentucky system was a simple, quick, and inexpensive procedure. The two-tier system gives defendants the added benefit of learning about the prosecution's case in the first trial without revealing their own case until the second trial.[15] The Supreme Court held that the double jeopardy clause does not prohibit an enhanced sentence upon reconviction, because the double jeopardy clause imposes no limitations on the retrial sentencing procedure.[16] The Court noted that defendants could avoid the two-tier procedure by pleading guilty and immediately receiving

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the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to section twenty-seven A. Such waiver shall not be received unless the defendant is represented by counsel or has filed a written waiver of counsel. Such trials by jury in the first instance shall be in those jury sessions designated by said section twenty-seven A for the hearing of such appeals. All provisions of law and rules of court relative to the hearing and trial of such appeals shall apply also to jury trials in the first instance.

MASS. GEN. LAWS ANN. ch. 218, § 26A (West Supp. 1984).

10 *Lydon*, 104 S. Ct. at 1808.

11 *Id.*

12 In Callan v. Wilson, 127 U.S. 540 (1888), the Supreme Court considered the constitutionality of the District of Columbia's two-tier system. Like the pre-1978 Massachusetts two-tier system, it provided only for a jury trial in the second-tier courts. The Supreme Court invalidated the procedure, holding that, except for petty offenses, the right to a jury is guaranteed from the very first moment of any criminal proceeding in any federal court. *Id.* at 557. In Ludwig v. Massachusetts, 427 U.S. 618 (1976), the Supreme Court distinguished the applicability of the *Callan* holding to federal courts from its applicability to a state two-tier system because the right to a jury trial in a federal court was mandated by article III of the Constitution, U.S. CONST. art. III, § 2, cl. 3, in addition to the sixth amendment. *Ludwig*, 427 U.S. at 629-30.

13 407 U.S. 104 (1972). At the bench trial, Colten was convicted of disorderly conduct and fined ten dollars. *Id.* at 107-08. He then exercised his right to a jury trial de novo and was convicted again and fined fifty dollars. *Id.* at 108. After the Kentucky Court of Appeals affirmed his conviction, the United States Supreme Court noted probable jurisdiction. 404 U.S. 1014 (1972).

14 *Colten*, 407 U.S. at 108-09.

15 *Id.* at 117-18.

16 *Id.* at 117-20. The Court had rejected earlier the same contention in North Carolina v. Pearce, 395 U.S. 711 (1969).

a jury trial de novo.[17] The Court concluded that the Kentucky de novo system was constitutional.

In *Ludwig v. Massachusetts*,[18] the Supreme Court upheld the constitutionality of the Massachusetts two-tier trial system. The defendant challenged the Massachusetts procedure in effect prior to 1978. The pre-1978 procedure required a first-tier bench trial before the defendant could appeal for a jury trial de novo.[19] Ludwig argued that the Massachusetts procedure violated the double jeopardy clause.[20]

The Supreme Court rejected Ludwig's double jeopardy contention. The Court reasoned that the decision to obtain a trial de novo rested with the accused.[21] The Court analogized the defendant's right to a trial de novo with the right to a new trial of convicted defendants who successfully appeal their convictions.[22] In both situations, the State may reprosecute.[23] The only difference between the two situations is that under the Massachusetts two-tier system, defendants may obtain a new trial without alleging any trial error at their first trial.[24] The Court concluded that nothing in the double jeopardy clause prevents a state from offering a defendant two chances for acquittal, and it upheld the two-tier system.[25]

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17 *Colten*, 407 U.S. at 118-19.

18 427 U.S. 618 (1976). Ludwig was charged with driving negligently in a manner that endangered the lives and safety of the public. *Id.* at 622-23. Prior to the bench trial, he moved for a speedy jury trial. *Id.* at 623. The judge denied his motion, convicted him, and fined him twenty dollars. *Id.* Prior to his jury trial de novo, Ludwig filed a motion to dismiss on the grounds that he had been deprived of a speedy trial and that he already had been placed in jeopardy. The second-tier trial judge denied the motion, and Ludwig was convicted again and fined twenty dollars. *Id.* The Massachusetts Supreme Judicial Court affirmed the conviction, Commonwealth v. Ludwig, 368 Mass. 138, 330 N.E.2d 467 (1975), and Ludwig appealed to the United States Supreme Court. 423 U.S. 945 (1975) (noting probable jurisdiction).

The Supreme Court stated that the Massachusetts system required an initial bench trial only for certain minor offenses and allowed the defendant an initial jury trial for serious offenses. *Ludwig*, 427 U.S. at 625. The Court held that Ludwig presented no evidence that he would have received a quicker trial absent a de novo system. The Court added that waiving a jury trial almost always allows a faster determination of a defendant's guilt or innocence. *Id.* at 629.

19 For a discussion of the pre-1978 Massachusetts two-tier system, see *infra* note 76 and accompanying text.

20 *Ludwig*, 427 U.S. at 620.

21 *Id.* at 631.

22 *Id.*

23 *Id.* at 632 (citing United States v. Ball, 163 U.S. 662 (1896)).

24 *Ludwig*, 427 U.S. at 632.

25 *Id.*

B. *BURKS v. UNITED STATES*

In addition to decisions upholding two-tier systems, the Supreme Court has decided many cases involving a similar situation—retrial following reversal for insufficient evidence. Before its decision in *Burks*,[26] the Supreme Court's decisions were inconsistent and unclear in cases concerning double jeopardy allegations in retrials where the reviewing court had reversed for evidence insufficient to uphold the verdict.[27] The Supreme Court sometimes had remanded cases for new trials and in other cases had granted acquittals, yet never explained why either remedy was appropriate.[28] Because the Supreme Court provided no guidance to lower courts in choosing the proper remedy, the lower courts created their own widely varying reasons for deciding whether a new trial or an acquittal should be granted when the evidence in the initial trial was insufficient.[29]

The *Burks* Court eliminated these inconsistencies by overruling the four leading cases in this area.[30] The Court held that the double

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26 437 U.S. 1 (1978); *see supra* notes 3 & 4 and accompanying text.

27 *Burks*, 437 U.S. at 9.

28 For a discussion of the Supreme Court's inconsistencies in this area, see *infra* note 30 and accompanying text.

29 *See infra* note 30 and accompanying text.

30 The confusion in the *Burks* line of cases was created initially by the Court in Bryan v. United States, 338 U.S. 552 (1950) (the defendant was convicted of federal income tax evasion and his motions for judgment of acquittal or a new trial in the alternative were denied). The court of appeals in *Burks* relied on *Bryan* as authority for the proposition that the reviewing court had discretion in determining when to grant a motion for acquittal or remand for a new trial after a defendant's conviction. United States v. Burks, 547 F.2d 968, 970 (6th Cir. 1976), *rev'd*, 437 U.S. 1 (1978). In *Bryan*, the reviewing court had reversed the defendant's conviction for insufficient evidence and directed a new trial. On appeal, the Supreme Court rejected the defendant's double jeopardy claim. The Court held that " 'where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial.' " Bryan v. United States, 338 U.S. at 560 (quoting Francis v. Resweber, 329 U.S. 459, 462 (1947); citing Trono v. United States, 199 U.S. 521, 533-34 (1905), for the same proposition). Because *Bryan* made no distinction between reversals for trial error and reversals for insufficient evidence, *Bryan* established the rule that a new trial was the appropriate remedy for either type of reversal. *See* Note, Burks v. United States: *Redrawing the Lines in Double Jeopardy*, 1979 DET. C.L. REV. 193, 195. The Court's failure in *Bryan* to differentiate between failure of proof and procedural error as grounds for reversal caused confusion among lower courts. *Id.*

Five years after *Bryan*, the Supreme Court faced a similar double jeopardy claim in Sapir v. United States, 348 U.S. 373 (1955) (per curiam) (a jury in the district court convicted the defendant of conspiracy to defraud the United States). In *Sapir*, the appellate court reversed the defendant's conviction because of insufficient evidence. Although the defendant sought acquittal, the appellate court ordered a new trial presumably following the rule of *Bryan*. Without presenting case law or authority, the Supreme Court held that Sapir could not be retried and granted Sapir an acquittal. In a concurring opinion, Justice Douglas stated that the granting of a new trial violated the defendant's double jeopardy right unless the defendant specifically requests a new trial.

jeopardy clause prohibits a second trial once a reviewing court finds that the evidence in the first trial is legally insufficient to uphold the verdict.[31] The only "just remedy available" when the evidence is insufficient is a judgment of acquittal.[32] The Court distinguished between trial error, which the government may appeal, and failure of proof, which the government may no longer appeal.[33] The Court reasoned that a reversal for trial error involves a defect in the judicial process and implies nothing about the guilt or innocence of the defendant.[34] But reversal because of insufficient evidence involves the state's failure to prove its case during the one trial permitted by the double jeopardy clause.[35] With the distinction between double

348 U.S. at 374 (Douglas, J., concurring). Justice Douglas distinguished *Sapir* from *Bryan* by the fact that Sapir had asked only for an acquittal, whereas Bryan had asked for either an acquittal, or a new trial.

Justice Douglas' distinction between asking for a new trial and asking for a judgment of acquittal was accepted by the Court in Yates v. United States, 354 U.S. 298 (1957) (fourteen defendants were convicted of communist conspiracy under the Smith Act, 18 U.S.C. § 371 (1940)). In *Yates*, the defendants all sought either reversals because of insufficient evidence or new trials because of errors allegedly committed in the first trial. The Court ordered acquittals for five defendants because the evidence was clearly insufficient, but ordered new trials for eight others because the evidence was not clearly insufficient. *Id.* at 328-29. The Court confused matters by not clearly explaining the disparate treatment given to these defendants. Justice Black, however, disagreed and stated that a finding of insufficient evidence should not allow a court to inflict a second jeopardy by retrial. *Id.* at 341-42 (Black, J., concurring in part and dissenting in part).

The Supreme Court further confused matters in Forman v. United States, 361 U.S. 416 (1960) (defendant was convicted of conspiracy to evade income tax). In *Forman*, the defendant alleged procedural trial error and obtained an acquittal by the appellate court. 259 F.2d 128, 135 (9th Cir. 1958). On rehearing, the same court modified its prior order and remanded the case for a new trial. 261 F.2d 181 (9th Cir. 1958). The Supreme Court concluded that because the defendant himself had requested a new trial, there was no double jeopardy violation. *Forman*, 361 U.S. at 425-26. The Supreme Court again failed to differentiate between the two grounds for reversal. Realizing that these cases offered little assistance to a lower court in deciding whether to grant an acquittal or remand for retrial, the Court in *Burks* overruled them. *Burks*, 437 U.S. at 18.

31 437 U.S. at 18. In *Burks*, the defendant was convicted of robbing a federally insured bank, despite substantial evidence that he suffered mental disorders and was incapable of conforming his behavior to the law. *Id.* at 3. The court of appeals reversed the conviction on the ground of insufficient evidence and remanded the case to the trial court to either issue an acquittal or order a new trial. *Id.* at 3-4. The defendant appealed to the Supreme Court, contending that appellate reversal for legally insufficient evidence was the equivalent of a judgment of acquittal. An acquittal would have barred retrial. *Id.* at 5.

32 *Id.* at 18.

33 *Id.* at 15-16.

34 *Id.* at 15. *See also* Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. CHI. L. REV. 365, 370 (1964) (discussing the differing interests between society and a defendant if trial error was sufficient for acquittal of defendant by the reviewing court).

35 *Burks*, 437 U.S. at 16; see also Note, *supra* note 34, for a discussion of the interests of defendant and society when the evidence is found to be legally insufficient.

jeopardy violations and allowable retrials firmly established in *Burks*, the Supreme Court decided *Lydon*.

III. FACTS

Michael Lydon was arrested after breaking into an automobile and charged with possession of burglarious instruments with intent to commit larceny.[36] Lydon chose a bench trial and was convicted. The bench trial judge rejected Lydon's claim that the state had failed to prove his intent to steal money or property from the automobile.[37] After the bench trial, Lydon requested a jury trial de novo and was released on personal recognizance pending retrial. Lydon petitioned the jury session judge[38] to dismiss the charge against him on the grounds that the state presented insufficient evidence at the bench trial.[39] Lydon alleged that his retrial would violate his double jeopardy right. Lydon claimed that the decision in *Burks* prohibited the state from trying him twice for the same offense.[40] The jury session judge denied Lydon's motion.[41]

Alleging that the jury trial de novo violated his double jeopardy right, Lydon petitioned the single justice session of the Massachusetts Supreme Judicial Court[42] and received a stay of his jury trial.[43] The justice then asked the full court to review Lydon's double jeopardy claim.[44] The Supreme Judicial Court held that the jury trial de

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[36] *Lydon*, 104 S. Ct. at 1808.

[37] *Id.*

[38] The jury session judge is the second-tier judge in the Massachusetts system who presides over the jury trial de novo. MASS. GEN. LAWS ANN. ch. 218, § 27A (West 1974 & Supp. 1984).

[39] *Lydon*, 104 S. Ct. at 1808.

[40] *Id.* Lydon claimed that because the evidence presented at the bench trial was legally insufficient to justify his conviction, *Burks* precluded a de novo trial by jury. *Id.*

[41] *Id.*

[42] The superintendence of inferior courts statute provides that the Supreme Judicial Court shall have "general superintendance" power over the Massachusetts courts of inferior jurisdiction. The general superintendance power includes the power to issue "such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice . . . ." MASS. GEN. LAWS ANN. ch. 211, § 3 (West 1974 & Supp. 1984).

The single justice session allows defendants to bring appeals to one member of the Massachusetts Supreme Judicial Court, who then may dismiss the claim or report it to the full court for possible action. MASS. GEN. LAWS ANN. ch. 211, §§ 3, 4A (West 1974 & Supp. 1984).

[43] *Lydon*, 104 S. Ct. at 1808.

[44] Justice Wilkens indicated that he believed the evidence was legally insufficient to support Lydon's conviction, but did not report a finding on the sufficiency of the evidence. Instead, he reported two questions to the full bench:

1. Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, requested by him without waiving his rights, when the evidence at the bench trial was insufficient to warrant a conviction?

novo would not place Lydon in double jeopardy,[45] that *Burks* was inapplicable because no appellate court had ruled that the evidence at Lydon's first trial was insufficient, and that no court would ever review the bench trial conviction under Massachusetts law.[46] The Supreme Court denied Lydon's writ of certiorari on his double jeopardy allegations.[47]

Lydon then left the state court system and petitioned for a writ of habeas corpus in the United States District Court for the District of Massachusetts. The district court granted the writ. The court ruled that it had jurisdiction pursuant to 28 U.S.C. § 2254[48] because Lydon was in custody and had exhausted all his state remedies, except for a retrial.[49] After reviewing the original trial transcript, the district court found that the evidence against Lydon was legally insufficient to support a conviction and concluded that under *Burks*, the double jeopardy clause barred retrial.[50]

The Commonwealth appealed the decision on the grounds that the district court lacked jurisdiction to grant habeas corpus relief and that Lydon's jury trial de novo would not violate the double jeopardy clause.[51] The First Circuit Court of Appeals affirmed the

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2. Assuming that a jury trial in such an instance would be a denial of a defendant's right not to be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level, assuming, of course, that the judge at the bench trial has denied an appropriate request for a ruling that the evidence at the bench trial was insufficient?

Lydon v. Commonwealth, 381 Mass. 356, 358 n.3, 409 N.E.2d 745, 747 n.3, *cert. denied*, 449 U.S. 1065 (1980).

45 *Id.* at 356, 409 N.E.2d at 745.

46 *Id.* at 360-61, 409 N.E.2d at 748-49.

47 449 U.S. 1065 (1980).

48 Lydon v. Justices of Boston Municiple Court, 536 F. Supp. 647, 649 (D. Mass), *aff'd*, 698 F.2d 1 (1st Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 1805 (1984). The custody and exhaustion requirements in 28 U.S.C. § 2254, provide in part:

(b) An application for a writ of habeas corpus in behalf of a person *in custody pursuant to the judgment of a State court* shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(emphasis added).

49 *Lydon*, 536 F. Supp. at 650. The federal district court found that Lydon's release on personal recognizance met technical custody requirements for habeas corpus review because Lydon's presence could be demanded by state judicial officials having power to reimpose his original sentence. *Id.* at 649-50; *see also* Hensley v. Municipal Court, 411 U.S. 345, 351 (1973) (defendant released under order of state court staying sentence is "in custody" within meaning of habeas corpus statute).

50 *Lydon*, 536 F. Supp. at 652.

51 *Lydon*, 104 S. Ct. at 1809.

district court's holding.[52] One justice dissented and stated that the two-tier system provided all the double jeopardy protection of a more conventional single-tier system and allowed defendants an additional opportunity to be acquitted on the facts.[53] The dissent argued that the fifth amendment did not require the result in the First Circuit's decision and that the decision undermined a fair and useful criminal procedure.[54] The Supreme Court granted certiorari to consider both the jurisdictional and double jeopardy issues.[55]

IV. THE SUPREME COURT DECISION

In *Justices of Boston Municipal Court v. Lydon*,[56] the Supreme Court reversed the First Circuit Court of Appeals and held that the defendant's jury trial de novo without a judicial determination of the sufficiency of the evidence at his prior trial does not violate the double jeopardy clause.[57] Through Justice White,[58] the Court set forth three reasons for its decision. First, the Court held that the concept of "continuing jeopardy" is implicit in the double jeopardy clause. Lydon's first-tier conviction did not terminate jeopardy, but

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52 Lydon v. Justices of Boston Municipal Court, 698 F.2d 1, 7 (lst Cir. 1982), *rev'd*, 104 S. Ct. 1805 (1984). The court concluded that habeas corpus relief was proper for Lydon and that under *Burks*, Lydon could not be retried.

53 *Id.* at 11 (Campbell, J., dissenting). The dissent stressed that if Lydon had followed the prescribed procedure, he would have been acquitted for insufficient evidence at both the de novo jury trial and the appellate court. *Id.* at 12.

54 *Id.* at 10 (Campbell, J., dissenting).

55 103 S. Ct. 3535 (1983).

56 104 S. Ct. 1805 (1984).

57 *Id.* at 1814.

58 Justice White delivered the Court's opinion, in which Justices Blackmun and Rehnquist joined. Justice Brennan, joined by Justice Marshall, filed an opinion concurring in part and concurring in the judgment. Justice Powell, joined by Chief Justice Burger, filed an opinion concurring in part and concurring in the judgment. Justice Stevens filed an opinion concurring in part and concurring in the judgment. Justice O'Connor filed an opinion concurring in the judgment.

Before rejecting Lydon's double jeopardy claims, the Court examined the habeas corpus jurisdictional question. The Supreme Court agreed with the First Circuit Court of Appeals that the district court was correct in maintaining jurisdiction under 28 U.S.C. § 2254(b). *Id.* at 1811. For the exact language of federal habeas corpus sections discussed by the Court, see *supra* note 48.

Justice O'Connor concurred only in the judgment of the Court because she concluded that the district court lacked jurisdiction to hear Lydon's habeas petition. *Lydon*, 104 S. Ct. at 1828-29 (O'Connor, J., concurring in the judgment). Justice O'Connor concluded that Hensley v. Municipal Court, 411 U.S. 345 (1973), controlled the denial of Lydon's habeas corpus writ. *Lydon*, 104 S. Ct. at 1829-30 (O'Connor, J., concurring in the judgment). Justice Powell, with whom Chief Justice Burger joined, agreed with Justice O'Connor that there was no federal habeas corpus jurisdiction for Lydon, but joined in the rest of the Court's opinion rejecting Lydon's double jeopardy claims. *Lydon*, 104 S. Ct. at 1823 (Powell, J., concurring in part and concurring in the judgment).

merely continued the jeopardy through the second-tier trial.[59] Second, the Court held that the defendant's voluntary choice to participate in a first-tier trial without the possibility of appellate review did not violate his double jeopardy right and was consistent with the Court's previous decisions upholding two-tier trial systems.[60] Third, the Court held that the Massachusetts two-tier system does not violate any of the policies underlying the double jeopardy prohibition and provides significant advantages to both the defendant and the state.

A. THE CONTINUING JEOPARDY THEORY

Justice White stated that the Supreme Court has recognized the concept of "continuing jeopardy"[61] and that continuing jeopardy is applicable "where criminal proceedings against an accused have not run their full course."[62] "Full course" is the end of all legal proceedings for defendants; either the defendants are acquitted or their convictions become final after they exhaust all methods of appeal.[63] The Court explained that if an accused is acquitted, the initial jeopardy terminates, and any retrial would subject the accused to double jeopardy.[64] Furthermore, the Court in *Burks* recognized that an unreversed determination by a reviewing court that the evidence at the trial was legally insufficient also terminates the initial jeopardy. But a conviction does not terminate the initial jeopardy, the Court explained, because an appeal or a new trial merely continues the initial jeopardy. Jeopardy ends when the criminal proceedings reach their full course.[65] The Court reasoned that if the bench trial judge had acquitted Lydon, Lydon's retrial would be barred under the double jeopardy clause. But Lydon simply asserted in his appeal that the bench trial judge should have acquitted him. A "claim of eviden-

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59 *Lydon*, 104 S. Ct. at 1813-14. *See infra* notes 61-67 and accompanying text.

60 *Lydon*, 104 S. Ct. at 1813. For a discussion of previous Supreme Court decisions concerning two-tier systems, see *supra* notes 12-25 and accompanying text.

61 *Lydon*,104 S. Ct. at 1814 (citing Breed v. Jones, 421 U.S. 519, 534 (1975); Price v. Georgia, 398 U.S. 323, 329 (1970)).

62 *Lydon*, 104 S. Ct. at 1813-14 (quoting Price v. Georgia, 398 U.S. at 326). In *Price*, the Court held that the defendant could be retried for voluntary manslaughter following the reversal of his conviction on appeal. 398 U.S. at 326. The Court allowed the retrial on the basis of United States v. Ball, 163 U.S. 662 (1896), which held that the state may reprosecute after reversal of a defendant's conviction. *Id.* In *Ball*, the retrial was granted after the reviewing court determined that fatally defective indictments constituted trial error. *Id.* at 664.

63 Green v. United States, 355 U.S. 184, 189 (1957) (citing State v. Aus, 105 Mont. 82, 69 P.2d 584 (1937)).

64 *Lydon*, 104 S. Ct. at 1814.

65 *Id.*

tiary failure [by a defendant] and a *legal judgment* to that effect . . . have different consequences under the Double Jeopardy Clause."[66] Unlike the defendant in *Burks*, Lydon's conviction had not been reversed due to failure of proof, and the second-tier jury trial was part of his continuing jeopardy. "While technically [the defendant] is 'tried again,' the second stage proceeding can be regarded as but an enlarged, fact-sensitive part of a single continuous course of judicial proceedings . . . ."[67]

Justice Brennan concurred in part and concurred in the judgment because he agreed with the Court that Lydon's guilty verdict did not " 'terminate' one trial and thereby permit a claim that a second trial was barred due to insufficient evidence."[68] Justice Brennan, however, disagreed strongly with the Court's use of the continuing jeopardy concept. He objected to the state's characterizing the legal judgment as the jeopardy-terminating point; this approach sets no limit to a state's ability to withhold the necessary legal judgment to maintain continuing jeopardy and to justify repeated attempts to gain a conviction.[69] Justice Brennan also criticized the Court for justifying the *Ball* rule,[70] which allows retrial after reversal for trial error, with the notion that convictions at trial do not terminate jeopardy.[71] Justice Brennan believed that the Court adopted the *Ball* rule because the "sound administration of justice" requires that the government be allowed to retry defendants following reversals for trial error.[72] Justice Brennan argued

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66 *Id.* (emphasis added).

67 *Id.* (quoting Lydon v. Justices of Boston Municipal Court, 698 F.2d 1, 12 (1st Cir. 1982) (Campbell, J., dissenting), *rev'd*, 104 S. Ct. 1805 (1984)).

68 *Lydon*, 104 S. Ct. at 1823 (Brennan, J., concurring in part and concurring in the judgment).

69 *Id.* at 1817 (Brennan, J., concurring in part and concurring in the judgment).

70 *Id.* at 1818 (Brennan, J., concurring in part and concurring in the judgment). *See supra* note 62.

71 *Lydon*, 104 S. Ct. at 1818 (Brennan, J., concurring in part and concurring in the judgment).

72 *Id.* (quoting United States v. Tateo, 377 U.S. 463, 466 (1964); citing Tibbs v. Florida, 457 U.S. 31, 40 (1982); United States v. Francesco, 449 U.S. 117, 131 (1980); United States v. Scott, 437 U.S. 882, 889-92 (1978); United States v. Wilson, 420 U.S. 332, 343-44, n.11 (1975)).

Justice Brennan also noted that the Court cited Price v. Georgia, 398 U.S. 323, 329 (1970), for support of its statement that continuing jeopardy is implicit in *Ball*. *Lydon*, 104 S. Ct. at 1818 n.4 (Brennan, J., concurring in part and concurring in the judgment). Justice Brennan concluded that *Price* did not approve of the continuing jeopardy approach. *Id.* (citing Price v. Georgia, 398 U.S. 323, 328 n.3). Justice Brennan urged that *Price* suggests that continuing jeopardy reflects a variety of interests, including "fairness to society, lack of finality, and limited waiver . . . ." *Lydon*, 104 S. Ct. at 1818 n.4 (Brennan, J., concurring in part and concurring in the judgment) (quoting *Price*, 398 U.S. at 329 n.4).

that the policies underlying the double jeopardy clause incorporate the "serving justice" notion.

B. DEFENDANT'S VOLUNTARY CHOICE

In addition to concluding that the Massachusetts system does not violate double jeopardy principles, the Court noted that the defendant had chosen freely a first-tier bench trial that did not allow for appellate review.[73] The Court concluded that " 'nothing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal.' "[74] Justice Brennan also concurred with the Court that Lydon's voluntary choice in accepting the advantages flowing from the two-tier system did not violate his double jeopardy right.[75]

The Court emphasized that its earlier decision in *Ludwig v. Massachusetts*,[76] upholding the two-tier system in Massachusetts, was not

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[73] *Lydon*, 104 S. Ct. at 1812. The Court reasoned that Lydon's voluntary choice of a trial de novo puts him in no different a position than convicted defendants who are successful in having their convictions reversed and their cases remanded for a new trial. *Id.* Safeguards are provided in the statute so that defendants who elect to waive their right to a jury trial initially must be represented by counsel or have signed a written waiver of counsel. *See supra* note 9.

In Lydon v. Commonwealth, 381 Mass. 356, 409 N.E.2d 745, *cert. denied*, 449 U.S. 1065 (1980), the Supreme Judicial Court of Massachusetts relied heavily on the fact that because Lydon had waived his right to a jury trial and knowingly elected a bench trial without the availability of appellate review, he had waived his right to be free from being placed in double jeopardy. *Id.* at 365, 409 N.E.2d at 751. The Massachusetts court, however, indicated in a footnote that although the consent form informs defendants that if they are dissatisfied with the results of the bench trial, they may request a de novo jury trial, the consent form should be enlarged so that defendants acknowledge that their only avenue of relief from any error in the bench trial is a trial de novo. *Id.* at 365 n.13, 409 N.E.2d at 751 n.13.

But see Comment, *Double Jeopardy Problems Presented by Two-Tier Systems*, 69 GEO. L.J. 1525, 1537-41 (1981); Comment, Lydon v. Commonwealth*: Double Jeopardy and the De Novo System—Challenging the Sufficiency of the Evidence Presented at the Original Trial*, 16 NEW ENG. L. REV. 303, 315-20 (1981). These commentators criticized the Massachusetts court's decision because the defendant's waiver of his double jeopardy right was made without a full appreciation of the consequences of a bench trial denying review of the sufficiency of the evidence. *See* Johnson v. Zerbst, 304 U.S. 458 (1938) (setting forth the requirements for an effective waiver of constitutional rights). The Supreme Court in *Lydon* avoided this potential problem by refusing to characterize the defendant's choice of a bench trial as a waiver of his double jeopardy right. Instead, the Court concluded that Lydon's double jeopardy right was not violated by the two-tier system and that he was free to receive two chances for an acquittal. 104 S. Ct. at 1815-16.

[74] *Lydon*, 104 S. Ct. at 1815-16 (quoting Ludwig v. Massachusetts, 427 U.S. at 632).

[75] 104 S. Ct. at 1822-23 & n.8 (Brennan, J., concurring in part and concurring in the judgment).

[76] 427 U.S. 618 (1976). In *Ludwig*, the Court upheld a prior Massachusetts two-tier system of trials for minor criminal offenses that differed only slightly from the present system. *See supra* notes 18-25 and accompanying text. Prior to the Massachusetts Court Reorganization Act of 1978, defendants were required to have a first-tier bench trial

disturbed by its later decision in *Burks*.[77] The Court explained that *Burks* barred a second trial after a reviewing court reversed a conviction for failure of proof at trial. Because Lydon would never receive an evidentiary review of his bench trial, *Burks* does not apply to this situation.[78]

C. POLICY ADVANTAGES OF THE TWO-TIER SYSTEM

Justice White evaluated the policies underlying the double jeopardy clause as an independent reason for finding Lydon's double jeopardy claims to be without merit. The Court stressed that the Massachusetts two-tier trial system thwarted none of the guarantees of the double jeopardy clause.[79] The Commonwealth was not attempting to punish Lydon twice for the same offense,[80] nor was it trying to convict Lydon after his acquittal.[81] The Commonwealth was satisfied with Lydon's bench trial conviction and would have accepted the results of a jury trial had Lydon chosen to bypass the first-tier trial.

The Court emphasized that the double jeopardy clause does not absolutely bar retrial of the defendant. The Court justified retrials by maintaining that society's interests in punishing guilty defendants following fair trials are consistent with defendants' interests in obtaining fair trials.[82] Society would pay a very high price if all trial defects that are sufficient to constitute reversible trial error thereby immunized every accused from punishment.[83] Retrials allow society the opportunity to prosecute fairly all defendants and to obtain convictions of those who are guilty. Defendants also benefit from the strong protection reviewing courts afford against improprieties at the trial or pretrial stage. If reversals of convictions because of trial error irrevocably would place defendants beyond further prosecution, appellate courts would be less zealous in protecting defendants

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before proceeding to a jury trial. *Lydon*, 104 S. Ct. at 1811. Under the present system, defendants may avoid the bench trial and proceed directly to the jury trial. *Id.* They also may elect a bench trial in the first-tier and then request another bench trial in the second-tier trial. *Id.* at 1807-08 & n.1. The Court also had upheld previously Kentucky's two-tier de novo system against similar double jeopardy allegations indicating the Court's willingness to accept the two-tier system. *See supra* notes 12-17 and accompanying text.

77 *Lydon*, 104 S. Ct. at 1814.

78 *Id.*

79 *Id.* at 1813. *See supra* note 7 and accompanying text.

80 *Id.*

81 *Id.* The Court suggested that the defendant's problem is that he was not acquitted, and "simply maintains that he ought to have been." *Id.*

82 *Lydon*, 104 S. Ct. at 1813 (citing United States v. Tateo, 377 U.S. 463, 466 (1964)).

83 *Tateo*, 377 U.S. at 466.

against trial error.[84]

The Court also rejected Lydon's double jeopardy claims because the two-tier system is not the kind of "governmental oppression" against which the fifth amendment protects.[85] The two-tier system instead offers substantial benefits to defendants and the state.[86] The two-tier system allows defendants to preview the prosecution's case at the first-tier bench trial; if defendants are convicted, they will have a better opportunity to prepare for the second-tier jury trial.[87] Because an acquittal at the first-tier bench trial precludes a retrial, the defendant also knows that the prosecution must present its strongest case in the first-tier bench trial.[88] Justice Brennan also pointed out that the availability of a second-tier jury trial will reduce defendants' anxiety over the outcome of the first-tier trial.[89]

The state also favors the two-tier system; because many defendants forego their right to a second-tier trial after being convicted at the bench trial, the state disposes of many cases quickly and cheaply.[90] The Court concluded that upholding Lydon's double jeopardy claims would destroy a "useful and fair state procedure"[91] that affords defendants benefits that are unavailable in a more traditional system.[92]

V. ANALYSIS

The decision in *Lydon* combines a poorly reasoned theory of continuing jeopardy with a shrewd appreciation of the efficient two-tier trial system. The Court's interpretation of the continuing jeopardy principle does not protect defendants against double jeopardy infringements, but instead will allow future violations. The Court's analysis would have been much stronger if it had adopted Justice

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84 *Id.*

85 *Lydon*, 104 S. Ct. at 1814. The theory that the double jeopardy clause protects the accused from "governmental oppression" was stated in United States v. Scott, 437 U.S. 82, 91 (1978). Decided on the same day as *Burks*, the *Scott* decision held that where defendants themselves seek to have their trials terminated without any submission to either judge or jury as to their guilt or innocence, an appeal by the government from their successful efforts to do so does not offend the double jeopardy clause. *Id.* at 100-01.

86 *Lydon*, 104 S. Ct. at 1815.

87 *Id.*

88 *Id.*

89 *Id.* at 1822 (Brennan, J., concurring in part and concurring in the judgment).

90 *Id.* at 1815 n.8. *See infra* notes 124-25 and accompanying text.

91 *Lydon*, 104 S. Ct. at 1816 (quoting Lydon v. Justices of Boston Municipal Court, 698 F.2d 1, 10 (lst Cir. 1982) (Campbell, J., dissenting)).

92 *Lydon*, 698 F.2d at 11-12 (Campbell, J. dissenting).

Brennan's more persuasive explanation of the principle and application of continuing jeopardy.

A. CONTINUING JEOPARDY

Under the Court's theory of continuing jeopardy, the initial jeopardy terminates when the accused is acquitted because any retrial following an acquittal places the accused in double jeopardy. A conviction, however, does not terminate the initial jeopardy. A new trial following a conviction simply continues the intitial jeopardy and does not place the defendant twice in jeopardy.[93]

As Justice Brennan noted in his concurrence, however, the Court's use of the continuing jeopardy concept is inappropriate.[94] The Court in *Price* did not approve of the continuing jeopardy approach. The Court instead considered it to be merely a label representing a combination of interests, including "fairness to society, lack of finality, and limited waiver."[95] The Court in *Lydon* thus gave great significance to a label that previously had little value. Before *Lydon*, furthermore, a majority of the Court never had agreed that continuing jeopardy had any importance as a theory.[96] The Court before *Lydon* had been reluctant to allow a continuing jeopardy notion to defeat a defendant's double jeopardy allegations.[97]

In *United States v. Wilson*,[98] the Court rejected the theory of continuing jeopardy because it would have allowed the government to appeal after a verdict of acquittal.[99] The Court was concerned that the prosecution would claim a new trial on the ground that the jeop-

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93 *See supra* notes 61-67 and accompanying text.

94 104 S. Ct. at 1818 n.4 (Brennan, J., concurring in part and concurring in the judgment).

95 Price v. Georgia, 398 U.S. 323, 329 (1970). For the *Lydon* Court's interpretation of *Price*, see *supra* note 62 and accompanying text.

96 *Lydon*, 104 S. Ct. at 1818 (Brennan, J., concurring in part and concurring in the judgment) (citing United States v. Jenkins, 420 U.S. 358, 369 (1975)).

97 *See infra* notes 98-99 and accompanying text.

98 420 U.S. 332 (1975). *Wilson* was decided five years after the Court's decision in *Price*. Wilson was indicted and convicted for illegal conversion of union funds. The conviction was reversed on the ground that impermissible delay between the offense and the indictment prejudiced the defendant's right to a fair trial. The Government appealed and the Court held that the appeal did not violate the double jeopardy clause. *Id.*

99 *Id.* at 352. *See also* United States v. Scott, 437 U.S. 82 (1978) (Court rejected the continuing jeopardy notion). Commentators also have noted that the Court has never considered the continuing jeopardy theory to be persuasive. *See* Note, *Double Jeopardy—Juvenile Courts—Transfer to Criminal Court—Adjudicatory Proceedings*—Breed v. Jones, 95 S. Ct. 1779 (1975), 9 AKRON L. REV. 389, 395 (1975); Note, *Criminal Procedure—Double Jeopardy—Government's Right To Appeal A Midtrial Dismissal*—United States v. Scott, 98 S. Ct. 2187 (1978), 1978 B.Y.U. L. REV. 742, 753; Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts*, 24 STAN. L. REV. 874, 888 (1972).

ardy merely continued following the acquittal and that, therefore, the new trial did not subject the defendant to double jeopardy.[100] The Court in *Lydon* failed to explain why a theory that the Court previously neither accepted nor found significant now suddenly became dispositive.[101]

The Court's use of the continuing jeopardy theory also could encourage states to violate defendants' rights. Misapplication of the continuing jeopardy theory would allow states to withhold legal judgments terminating jeopardy until the prosecution decides that the cases have run their full course. States, therefore, could create prolonged periods of jeopardy during which the prosecution could attempt to gain convictions.[102] The Court also created the possibility of multiple convictions for the same offense.[103] Under the Court's continuing jeopardy theory, a state not satisfied with a second degree murder conviction could reprosecute the defendant in hopes of a first degree murder conviction because a conviction does not terminate the initial jeopardy. Multiple convictions for the same offense, however, are clearly contrary to the double jeopardy guarantees previously established by the Supreme Court in *Green*.[104]

The Court in *Lydon* could have avoided these problems by adopting Justice Brennan's continuing jeopardy theory. In his two-step approach, Justice Brennan requires a court to ask, first, whether the initial proceeding has now objectively ended and, second, whether a new proceeding would violate the double jeopardy clause.[105] The answer to the first question would be influenced "but not controlled by the States' characterization of the status of the proceedings . . . ."[106] Unlike the Court's approach, which grants total control to the state in determining what constitutes the full course of the proceedings, Justice Brennan gives the discretion to the courts. Courts could answer fairly the question of whether the trial has ended primarily by looking at the status of the criminal proceedings and the policies underlying the double jeopardy clause, such as avoidance of unnecessary anxiety, insecurity, and embarrass-

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100 *Wilson*, 420 U.S. at 352.

101 104 S. Ct. at 1817-18 (Brennan, J., concurring in part and concurring in the judgment).

102 *Id. See supra* notes 61-66 and accompanying text.

103 *Id.* at 1818 n.3 (Brennan, J., concurring in part and concurring in the judgment). *But see* Illinois v. Vitale, 447 U.S. 410 (1980), which specifically prohibits multiple convictions for the same offense under the double jeopardy clause.

104 *See supra* note 7 and accompanying text.

105 *Lydon*, 104 S. Ct. at 1821 (Brennan, J., concurring in part and concurring in the judgment).

106 *Id.*

ment.[107] The answer to the second question of whether a new trial would violate the double jeopardy clause would be consistent with the *Burks* analysis. If the reviewing court finds that the evidence in the first-tier bench trial is legally insufficient, a new proceeding would violate the double jeopardy clause.[108] If the first-tier trial is reversed for trial error, a new proceeding would not violate the double jeopardy clause.[109]

Applying his two-step analysis to the facts in *Lydon*, Justice Brennan indicated that the defendant's first-tier bench trial was a completed trial because the Court found the defendant guilty. Justice Brennan, however, concluded that the guilty finding at the first-tier bench trial did not terminate the jeopardy because the trial did not subject the defendant to the ordeal, anxiety, and embarrassment that the double jeopardy clause was designed to prevent.[110] The first-tier verdict also has much less significance than the verdict in a single-tier system because the defendant knows that a second fact-finding opportunity is available after the bench trial.[111] Justice Brennan's theory of continuing jeopardy neither leaves a defendant's double jeopardy right at the mercy of the prosecution's interpretation of the full course of the proceedings nor contradicts the *Burks* rule barring retrial after a determination of insufficient evidence.

Though the Court in *Lydon* for the first time relied on the continuing jeopardy theory, the negative impact of the Court's theory already has surfaced in *Richardson v. United States*.[112] In *Richardson*, the Court held that a jury's failure to reach a verdict in a single-tier system and the trial court's declaration of a mistrial following a hung jury did not terminate jeopardy.[113] The Court concluded that under the theory of continuing jeopardy set forth in *Lydon* and *Price*, only the acquittal of Richardson will terminate the original jeopardy.[114] The jury's failure to reach a verdict was not considered the equivalent of an acquittal.[115] Justice Brennan dissented in part and noted that a new trial after a hung jury subjected the defendant to all the risks and burdens that the double jeopardy clause sought to

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107 *Id.* at 1821-22 (Brennan, J., concurring in part and concurring in the judgment).
108 *Id.* at 1821 & n.6 (Brennan, J., concurring in part and concurring in the judgment).
109 *Id.*
110 *Id.* at 1822 (Brennan, J., concurring in part and concurring in the judgment).
111 *Id.*
112 104 S. Ct. 3081 (1984). The District Court for the District of Columbia, under a single-tier system, convicted the defendant of federal narcotics violations.
113 *Richardson*, 104 S. Ct. at 3086-87.
114 *Id.* at 3086.
115 *Id.*

prevent.[116] He distinguished the retrials in *Lydon* on the ground that Richardson had received none of the benefits of the two-tier system that mitigated the harms prohibited by the double jeopardy clause.[117] Because the Court concluded that a hung jury continues the intitial jeopardy, the Court subjects defendants to double jeopardy by requiring a new trial.[118]

Though the Court in *Lydon* did not incorporate explicitly the policy advantages of the two-tier system in its formulation of the continuing jeopardy concept, the Court nonetheless was influenced by these policies in rejecting Lydon's double jeopardy claim.[119] The Court found several advantages to defendants under the two-tier system. Defendants can choose a first-tier bench trial, preview the prosecution's evidence against them, and thereby better prepare for their defense at the second-tier trial.[120] Defendants always have two full fact-finding opportunities to produce an acquittal.[121] Because an acquittal at the first-tier bench trial will bar another trial, the prosecution must put forth its best case initially.[122] Defendants also suffer less anxiety during the first trial because they have an absolute right to a trial de novo.[123] The defendants in Massachusetts not only were aware of these benefits, but also took advantage of them. One study revealed that of all defendants eligible to participate in the two-tier trial system, only nine percent of those defendants chose a second-tier jury trial initially.[124]

The Court also was influenced by the strong advantages the two-tier system offered the state. The system allows the state to dispose of thousands of criminal proceedings quickly and inexpensively because most defendants are either acquitted by the first-tier bench trial judge or do not appeal because first-tier judges usually impose mild sentences.[125] Because of these advantages, almost one-

116 *Id.* at 3087-88 (Brennan, J., concurring in part and dissenting in part).

117 *Id.* at 3088 n.1 (Brennan, J., concurring in part and dissenting in part). All the emotional significance and anxiety are present when defendants have only one attempt to influence the fact finder. *Id.*

118 *Id.* at 3088 (Brennan, J., concurring in part and concurring in the judgment). *But see* United States v. Sanford, 429 U.S. 14 (1976) (retrial following hung jury does not violate double jeopardy clause).

119 *Lydon*, 104 S. Ct. at 1814-15.

120 *Id.* at 1815.

121 *Id.* at 1823 (Brennan, J., concurring in part and concurring in the judgment).

122 *Id.* at 1815.

123 *Id.* at 1814-15 (citing Mann v. Commonwealth, 359 Mass. 661, 271 N.E.2d 331 (1971) (previous Massachusetts case upholding the constitutionality of the two-tier system)).

124 *Lydon*, 104 S. Ct. at 1815 n.8 (citing Lydon v. Commonwealth, 381 Mass. 356, 359 n.5, 409 N.E.2d 745, 748 n.5, *cert. denied*, 449 U.S. 1065 (1980)).

125 *See* Note, *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 83 n.40 (1976)

half of the states have adopted two-tier trial systems.[126]

The Court emphasized that these advantages to defendants and states protect the purposes underlying the double jeopardy clause. The two-tier system balances the interest of defendants in receiving a fair trial with society's interest in punishing the guilty.[127] Until the criminal proceedings have run their full course, society's interest in prosecuting defendants remains. Justice Brennan agreed with the Court that these interests should be balanced, but only if the courts, and not the prosecution, do the balancing. The courts should determine when the proceedings have ended and when the jeopardy is terminated.

The Court also was acutely aware of the impact its decision would have on many states' criminal justice systems had it upheld Lydon's claims. That decision would have authorized long delays for defendants challenging the sufficiency of the evidence in their first-tier bench trial. Instead of proceeding directly to a second-tier jury trial, a state reviewing court would have to decide the merits of the defendant's evidentiary claims.[128] By eliminating the need for a court to review these claims, the Court in *Lydon* allows two-tier systems in every state to proceed quickly from first-tier bench trials to second-tier jury trials. The costs of court review are also decreased because defendants' only avenue of appeal is a second-tier jury trial. As the Court concluded, a contrary holding would have led to the destruction of a "useful and fair state procedure."[129]

VI. CONCLUSION

The Court's decision in *Lydon* was wise and pragmatic in light of the delays, increased costs, and reductions in efficiency that would have resulted in many state criminal systems if the Court had struck

("Speedy conviction and sentencing of the guilty increases the deterrent effect of punishment, and permits rehabilitation or incapacitation of the criminal before he is able to commit additional crimes. Rapid acquittal of the innocent decreases the burden of pre-trial detention for defendants unable to post bail.").

126 *See* ARK. STAT. ANN. § 44-509 (1977 & Supp. 1979); COLO. R. CRIM. P. 37, COLO. REV. STAT. § 13-6-310 (1973); KAN. STAT. ANN. §§ 22-3609, 22-3609a, 22-3610 (1983); 39 MD. R. P. 911, 1314; MASS. GEN. LAWS ANN. ch. 218, § 26A (West Supp. 1984); MICH. COMP. LAWS ANN. § 774.34 (West 1982); MISS. CODE ANN. § 99-35-1 (1972); MONT. CODE ANN. § 46-17-311 (1983); NEV. REV. STAT. § 189.010 (1973); N.H. REV. STAT. ANN. §§ 502-A:11-12, 599 (1968); N.M. STAT. § 39-3-1 (1978); N.C. GEN. STAT. § 15A-1431 (1978 & Supp. 1981); N.D. R. CRIM. P. 37(g); PA. R. CRIM. P. 6006; TEX. CRIM. P. CODE ANN. art. 44.17, 45.10 (Vernon 1979); Va. Code § 16.1-136 (1982 & Supp. 1984); W. VA. CODE § 50-5-13 (1980 & Supp. 1984).

127 *Lydon*, 104 S. Ct. at 1815-16.

128 *Lydon*, 698 F.2d at 11 (Campbell, J., dissenting).

129 *Lydon*, 104 S. Ct. at 1816 (quoting *id.* at 10).

down the two-tier system in Massachusetts. The *Lydon* decision will not subject defendants to double jeopardy violations in two-tier systems because the system affords them two full opportunities for acquittal without the embarrassment, cost, and emotional trauma that the double jeopardy clause prohibits. It is unfortunate, however, that the Court based its decision partly on its theory of continuing jeopardy. A continuing jeopardy theory that leaves sole discretion to the prosecution to decide when the defendant's jeopardy terminates may lead to future double jeopardy violations. By adopting Justice Brennan's theory of continuing jeopardy, which is based on a court's determination of the double jeopardy clause purposes and not on a state's determination of when a proceeding has run its full course, the Court would have eliminated future constitutional violations and provided lower courts with a workable theory of continuing jeopardy.

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